IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 3RD JANUARY 2007 / 13TH PAUSHA 1928

CRL.A.No. 245 of 1997(C)

CC.2/1989 of II ADDL. SESSIONS COURT (C.B.I.)PALAKKAD
.....

APPELLANT: ACCUSED:

SRI.YOGINDRA RAJ,
S/O.LATE SARDARI LAL,
18, HEMKUNT, NEW DELHI – 110 048,
GENERAL MANAGER (RTD.) STATE TRADING CORPORATION OF INDIA LIMITED., JANPATH, NEW DELHI.

BY ADV. SRI.M.K.DAMODARAN (SR.)
SRI.SOJAN MICHEAL

RESPONDENT:COMPLAINANT:

STATE REPRESENTED BY DEPUTY SUPERINTENDENT OF POLICE, C.B.I., SPE. SIV (XI), NEW DELHI.

BY ADV. SRI.K.P.SATHEESAN (COUNSEL FOR C.B.I.)
SRI.M.N.SUKUMARAN NAYAR(SR.)
SRI.S.SREEKUMAR, SC FOR CBI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/01/2007 ALONG WITH CRA NO. 672 OF 1997 AND CRA NO. 673 OF 1997, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. KOSHY, J.

Crl. Appeal Nos. 245, 672 and 673 of 1997

Dated this the 3rd day of January, 2007

Judgment

Eleven accused persons faced charges under sections 409, 420, 466, 467, 468 and 471 of the Indian Penal Code read with section 109 and 120-B IPC as well as section 13 (2) read with section 13 (1) (d) of the Prevention of Corruption Act, 1988 (section 5 (2) read with section 5 (1) (d) of P.C. Act, 1947). They were also charge sheeted for offences punishable under section 5 of the Imports and Exports (Control) Act, 1947. First accused died. Second accused was absconding. Accused Nos. 4 to 11 were acquitted of all charges. Third accused was acquitted of charges under the Prevention of Corruption Act and under section 420, 466, 467, 468 and 471 of IPC, but, sentenced to undergo rigorous imprisonment for two years and fine of Rs.20,000/= for offences punishable under section 5A of the Imports and Exports (Control) Act read with section 109 and 120 of the Indian Penal Code, rigorous imprisonment for one year and fine of Rs.10,000/= for offences punishable under section 120B IPC and rigorous imprisonment for three years and fine of Rs.20,000/= for offences punishable

under section 409 IPC. Imprisonment sentenced for offence under section 120B IPC was to run concurrently with the term of imprisonment for offence punishable under section 5 of the Imports and Exports (Control) Act read with section 109 and 120B of IPC. There was a further direction that the imprisonment for offence punishable under section 109 IPC will run consecutive to the term of imprisonment awarded for the other offences.

2. Third accused filed Crl. Appeal No.245 of 1997 against the sentence of imprisonment. Against the acquittal of Accused Nos.4 to 8, Crl. Appeal No.672 of 1997 was filed after obtaining leave under section 378 (4) of the Code of Criminal Procedure. Accused Nos.9 to 11 are also no more. Against the acquittal of third accused for offences punishable under section 420, 467, 468 read with sections 109 and 120B of IPC as well as the offences punishable under the Prevention of Corruption Act, Crl.A. No.673 of 1997 was filed.

3. Facts of the case as revealed from the evidence are as follows:

From November, 1997 to February, 1978, State Trading Corporation (in short 'STC') has been importing

cement to meet the requirement of the Ministry of Industries. From 27th February, 1982, there was a change in the policy regarding import of cement and Government introduced dual pricing for levy users and non-levy users. This policy continued till 31.3.1983. From April, 1983, cement was again canalised through STC for actual user indent. For the year 1983-84 STC was authorised to import 4.25 lakh Metric Tonnes of cement against actual user requirements. According to the prosecution, a criminal conspiracy was hatched between A1 to A3 and PW1 on 31.5.1983 and on the basis of the above A1 submitted Ext.P6 application dated 31.5.1983 on behalf of St.Antony's Guild (represented by A1 Director) for allotment of 25,626 Metric Tonnes of imported cement for construction of 300 houses at Madhavaram (Madras) for members of the Guild. Along with the above, A1 submitted building plans with forged approval of local authority, forged certificate of Architects and false declaration of actual users. According to the prosecution, plans produced by A1 (Ext.P3 series) were with forged approval of local authority and certificate of Chartered Engineers and declarations were also forged. Ext.P2 series are

under the letter heads of PW1 who was a Chartered Engineer. It is the case of the appellant that A1 with the help of A4 to A11 dishonestly misappropriated the entire cement taken delivery through Tuticorin Port in violation of the terms and conditions of the imported cement.

4. Originally, Kerala Police investigated the matter and thereafter investigation was transferred to CBI. On going through the judgment of the trial court, one cannot make out whether trial was proceeded on the basis of a police complaint. It is the case of the CBI that it was taken on a complaint filed by Deputy Chief Controller of Imports and Exports, Kochi. The original of the above complaint was not seen marked in the case. Several attempts were made by the Special Court to summon the file, but, the entire files were not forwarded despite repeated directions. The trial court noted in the judgment as follows:

> "It was only last month some records were received from the CBI Court in this Court. Some records are seen not yet transmitted from the CBI Court. The original complaint filed under section 6 of the Impex Act is not on record. From the records, it

> is seen that as early as on 17.1.1989, the CBI had filed application before the Addl.CJM, Ernakulam for transfer of the FIR and connected records to this Court from that Court to Special Court CBI-II, Ernakulam."

Again, it was observed as follows:

> "It was on study of the case records, after close of evidence that I realised that some of the case records are not available now on the file before court, the whereabouts of the same is not yet known. It was reported by the learned Special Public Prosecutor that those records were probably lost in course of transit of records at various courts, or not produced after return to the investigating agency from the concerned courts. Even the original complaint filed under section 6 of the Impex Act is not on the case file."

Even copy of the complaint produced without seal shows that pages 4 to 17 are missing. It is the case of prosecution that as early as in 1983, a conspiracy was hatched between A1, A2 and PW1 and other persons like Nagarajan, Selvaraj and Thomas etc. to import cement from abroad and sharing of the commission by misappropriating the cement. In pursuance of the conspiracy, A1 and A2

approached the STC, New Delhi for allotment of cement and filed Ext.P6 application with certificate of PW1 for the same. A4 to A11 in implementation of the conspiracy hatched by A1, A2, PW1 and others took delivery of the cement from Tuticorin Port and diverted the same in different parts of Kerala.

5. Prosecution had examined PWs 1 to 218 and marked Exts.P1 to P2521 and defence has marked Exts.D1 to D23. Court has summoned and marked Exts.C1 to C3. MOs 1 and 2 were marked by the prosecution as material objects. Six issues were framed by the trial court. The above issues are as follows:

> "1. Whether these accused had abetted for the offences or had formed criminal conspiracy as alleged by the prosecution?
>
> 2. Whether any or all the accused persons had committed any offence under S.5 of the Import and Export Control Act, 1947 as alleged?
>
> 2. (A). If the case is hit by S.6 of the Imports and Exports (Control) Act?
>
> 3. Whether any or all these accused persons had forged documents and committed the offence punishable under section 420 IPC?

4. Whether A3 dishonestly induced STC to cause delivery of 25,000 Metric Tonnes of imported non-levy cement on false representation in pursuance to the alleged criminal conspiracy and so committed offence under section 420 read with section 109 and 120-B IPC?

5. Whether the third accused as General Manager, STC in his capacity of a public servant dishonestly disposed of the cement which property of the STC in breach of trust and so committed offence under section 409 IPC?

6. Whether A4 to A8 are constructively liable for the offence of criminal breach of trust committed by A3 under section 409 read with section 109 and section 120B IPC?

7. Whether A4 to A8 had in pursuance of criminal conspiracy dishonestly disposed of imported non-levy cement belonging to the STC by selling it at black market rate in violation of Imports and Exports (Control) Act, 1947 and import control order and whether any of these accused has committed offence punishable under section 406 of IPC thereby?

8. If A8 committed criminal breach of trust along with other accused and approved M.R. Lingam by dishonestly disposing imported non-levy cement of STC against

actual user condition and so committed offence under section 406 read with section 109 and section 120B IPC?

9. Whether any of these accused had forged documents to obtain supply of non-levy cement from STC in pursuance to the criminal conspiracy and so committed offence under section 467, 468 and 471 read with sections 109 and 120B IPC?

10. Whether A8 to 11 had fraudulently used forged documents for illegal gains and committed offence under section 471 IPC?

11. Whether A3 to A7 along with A1 and A2 constructively liable for using forged documents as alleged under section 471 read with section 109 and 120B IPC?

12. Whether A3 to A11 along with A1 and approver M.R. Lingam had committed offences under sections 467, 468 and 471 read with sections 109, 120B IPC?

13. Whether A3 a public servant abusing his position obtained for himself pecuniary advantages as alleged by the prosecution and so committed offence under section 13 (2) read with section 13 (1) (d) of the Prevention of Corruption Act?

14. Whether A4 to A8 along with A1, A2 and approver M.R. Lingam in pursuance to the criminal conspiracy committed the offences punishable under section 13 (2) read with

section 13 (1) (d) of P.C. Act, 1947 and sections 109 and 120B IPC?

15. Whether A4 to A8 along with A1, A2 and approver M.R. Lingam effected sale of non-levy cement as alleged by the prosecution and so committed offence under the Imports and Exports (Control) Act and rules and thereby committed any offence under section 5?

16. Whether A3 has committed offence under section 5 of the Imports and Exports (Control) Act, 1947 read with section 109 and 120B of IPC?"

6. Finding of issue No.1 was that A1 and A2 and PW1, the Approver have conspired each other for allotment of cement in favour of a non-existing guild in violation of law. According to the trial court, A3 had later joined the conspiracy for illegal activities. It was definitely found that A4 to A8 have no role in the conspiracy. A1 died and A2 was absconding. PW1 became the approver and finding is only against A3 on the finding that he joined the conspiracy at a later stage. With regard to issue Nos.2 and 2A, it was found that A3 is guilty under section of the Imports and Exports (Control) Act (for short 'Impex Act') and based on

evidence adduced by PW 216, it was held that he was having authorisation, but, he admitted that he could not produce any authorisation as envisaged under section 6 of the Act. Under issue Nos.3, 4 and 5, it was found that there is no evidence to come to the finding that A3 to A8 in pursuance of the conspiracy committed offences punishable under section 420 IPC. It was also found that there is no proof to constitute the ingredients of section 420 IPC against A3, but, A3 is found to have committed offence under section 409 IPC. Under issue No.6 it was found that prosecution has failed to make out any offence against A4 to A8 under section 409 read with section 109 or 120 B of IPC. Similarly, it was found that no offence was found under section 406 against A4 to A8 under issue Nos.7 and 8 individually or read with section 109 and 120B. With regard to issue No.9 it was recorded as follows:

> "As A1 and A9 to A11 being no more and the case against A2 is pending and point is left unanswered."

With regard to issue No.10, the trial judge found that "A4 to A8 had been involved in the sale of cement for and on behalf of the Guild (a fiction) to the knowledge of A4

and others with innocent ideas of profit making. It cannot be held that they are liable for offences under section 471 IPC." With regard to issue No.11, it was found as follows:

> "Despite the fact that A3 had reason to doubt f genuineness of the document, it cannot be held that A3 to A7 were involved in fabrication of the forged documents. No element of conspiracy or abetment also can be found against A3 to A7 in this context."

7. Issue No.12 was not answered as A9 to A11 died. Regarding issue No.13, the allegation of the prosecution that a bribe of Rupees Ten lakhs was settled between A1 and A3 for the illegal allotment of cement in favour of a non-existing Guild was not approved. It was further held that the allegation that A3 had obtained pecuniary advantage for allotment of cement was not correct and such an offence was not committed and so, A3 was acquitted under section 5 (1) (d) of the Prevention of Corruption Act. It was also held under issue No.14 that prosecution failed to prove the offences under the Prevention of Corruption Act against A3. It is the case of the third accused that if the prosecution has failed to prove the offences against A3 under sections

420, 466, 468, 471 and under section 420 read with section 109 and 120B and under section 5 of the Prevention of Corruption Ac, the trial court cannot convict him under any other offence. Since the case of the prosecution is inter-linked, it is impermissible to find A3 alone guilty of offence under section 409 and section 120B and section 5 of the Impex Act. The court found that A3 was not entertaining any dishonest intention nor he was a party to the forging of document or using the documents as genuine. It is also found that he did not commit any offence under section 420, 407, 468, 471 in pursuance of the conspiracy and he did not gain any pecuniary advantage in the transaction. If that be so, it is the contention of A3 that the trial court cannot find him guilty of offence under section 409 IPC read with section 120B and section 5 of the Imports and Exports (Control) Act.

8. Major allegation proved was that even though A3 raised doubt about the genuineness of the documents, he has cleared the same. It can be seen from the evidence of Marketing Manager PW2, Approver PW1, PW 203 Chief Finance Manager and PW216 Deputy Chief

Controller of Exports and Imports that STC is a company registered under the Companies Act and governed by the Board or Directors and the hierarchy is as follows:

Chairman (M.Y.Prilokar PW 206)

Executive Director, Cement Division (P.K.Shinglu)

Chief General Manager (Amarjit Sahay PW 202)

General Manager (Yoginder Raj - Appellant)

Marketing Manager (M.C.Dembla - PW2)

Dy. Marketing Manager (A.S.Dutta - PW3) Dy. Marketing Manager (Surinder Kishore - PW4)

It is the case of the appellant that PW202 and other higher officers also approved the documents. It may be true that A1 with the active help of PW1 Approver and A2 might have persuaded A3 also to believe that those documents submitted were genuine. Even though large number of witnesses were examined, apart from proving documents only with regard to the alleged transactions, prosecution relied on the evidence of the following ten witnesses.

PW1 MR Lingam (Approver)
PW2 Marketing Manager (M.C.Dembla)
PW3 Dy. Marketing Manager (AS Dutta)
PW4 Dy. Marketing Manager (Surinder Kishore)

PW7 Marketing Manager STC Madras (TV Veeraswamy)

PW158 Addl. Manager, Nedungadi Bank, Karol Bagh, Delhi (Mr. Muralidharan)

PW202 Chief General Manager (Amarjit Sahay)

PW203 Rangachari (Chief Finance Manager, STC Delhi.

PW206 Chairman (M.Y.Prilokar)

PW216 Deputy Chief Controller of Exports and Imports, Ernakulam (S.N.Nair).

9. Most important evidence is that of PW1. Evidence of PW1 would show that he tried to exonerate himself from the liabilities. PW1 is an Engineer by profession and he knows A1. According to him, A1 met him in 1982 for preparing a project for a housing colony consisting of 300 houses, schools, shopping complex and so on at Madhavaram (Madras) to submit before Banks or other financial institutions. According to PW1, he had prepared the project report including model drawings for 600 sq.ft., 800 sq. ft. and 1000 sq.ft. houses and cement requirement and PW1 says that he happened to meet A2 on 6.5.1983 as introduced by A1. At the meeting, A2 introduced as a big business man handing road transport system for Saudi Arabia and that he had taken over the project of A1 and offered employment to PW1 at Saudi

Arabia. As requested by A1, PW1 handed over the project report to A2. According to PW1, A1, A2 etc. had a discussion about the import of cement on the said project and sharing of profits. Thereafter, A2 got some blank signed letter heads of PW1 to submit for his overseas employment. These letter heads were forged as chartered Engineers' certificates and marked as Exts.P1 (a), (b), (c) and (d) respectively and identified by PW1 in his deposition. Along with Ext.P6 forged plans, Ext.P11 to P14 were also produced. In Ext.P1 (a), P1 (c) and P1 (d), it was falsely stated that the plans were approved by Madhavaram Town Panchayat. Ext.P10 declaration of A1 dated 30.5.1983 was also submitted along with Ext.P6 undertaking to use the cement for its members at Madras. The allegation that was mainly taken against A3 was that he received Ext.P6 application along with Ext.P1 (a) to P1 (d) and Exts.P10, P11 and P12 and it was acknowledged by him. In pursuance of Ext.P6 application, PW3 issued Ext.P5 (3) standard cement sale contract to A1 on 15.7.1983 along with Ext.P5 (2) covering letter dated 15.7.1983 and Ext.P5 (3) was received by A2 on 15.7.1983

itself as evidenced by Ext.P5 (2) (a). As per Ext.P5 (4) executed between A1 and A3 (signed on behalf of STC by A3) that price of cement cannot be fixed at that stage, but, fixing provisional price of Rs.700/- per metric tonne for furnishing performance guarantee. A1 received contract copy and Ext.P5 (4) is the acknowledgment dated 1.9.1983. Mode of sale was High Seas. As per Ext.P5 (3) contract, performance guarantee and security shall be furnished within four days of the contract and A1 executed Ext.P1 authorisation dated 2.6.1983 with A2 to deal with STC. A1 did not submit performance guarantee or security within four days of the execution of Ext.P5 (3). Therefore, A3 sent reminders to A1 to furnish performance guarantee and security. A1 was looking for parties for financing the deal. As spoken by PW1, A1 met one Chandrasenan and Rahman of Cochin Wines for finance. PW1 met them at the National Sports Club of India, New Delhi and they discussed with A3 about the guarantee and security. PW1 further evidenced that they frequently go to STC to meet A3. Since they were starting a deal with STC, meeting A3 being the General Manager is not a crime

and that will not show that there is any conspiracy. A1 forwarded performance guarantee and demurrage deposit dated 13.12.1983 from Canara Bank, Panampilly Nagar Branch, Ernakulam. Bank guarantee for Rs.17,50,000/= dated 13.12.1983 and demurrage guarantee for Rs.7,50,000/= dated 13.12.1983 were furnished in the name of Cochin Enterprises. PW2 issued Ext.P5 (5) letter dated 24.12.1983 to A1 asking the status of St.Antony's Guild. A1 sent Ext.P8 reply dated 15.3.1984 promising to produce the rules and regulations. A1 by Ext.P16 letter dated 5.1.1984 requested for return of the bank guarantees to make alternate arrangements and PW2 returned the bank guarantee on 7.1.1984. Those guarantees were not accepted as it was in the name of Cochin Enterprises. A1 met A4 to explain about the prospects of import of cement and A4 to A7 executed a partnership deed dated 7.1.1984 in the name and style of 'Malappuram Agencies' and A1 gave power of attorney to Malappuram Agencies to take delivery of the cement. A4 arranged finance from Nedungadi Bank, Perinthalmanna and opened accouned in the name of Malappuram Agencies.

10. PW9 is the Deputy Chief Manager of Nedungadi Bank, Perinthalmanna. PW10 was the Branch Manager of Nedungadi Bank, Perinthalmanna. PW10 had spoken that A1 along with A4 came to the Bank in December 1983 for financial assistance. A4 and A5 were the Managing Partners of Malappuram Agencies and Malappuram Agencies submitted Ext.P78 (2) applications dated 10.1.1984 to PW10 Branch Manager of Nedungadi Bank for financial assistance and financial assistance of Rs.2,85,09,500/= was granted and letter of credit No.454/84 dated 6.3.1984, Ext.P5 (14), for Rs.1,11,75,000/= was received by STC from Nedungadi Bank in the name of Malappuram Agencies. PW2 informed A3 by Ext.P9 letter that the letter of credit of Nedungadi Bank cannot be accepted as it is not a Nationalised Bank. PW2 in Ext.P9 letter expressed doubt about the actual user by A1 and recommended to A3 for cancellation of the contract. A1 by Ext.P5 (7) letter dated 20.3.1984 informed A3 that the housing project at Madras has been abandoned and 15,000 metric tonnes of cement may be diverted for the use of members of the guild at Malappuram. STC by Ext.P5 (8) letter called upon to

produce approved plan, approval from the local authority and certificate from the Architect. PW4 prepared Ext.P5 (15) note dated 19.3.1984 and pointed out certain irregularities to A1 and A1 forwarded 95 plans of building to be constructed at Malappuram. Again, Ext.P15 (11) letter was issued calling upon to furnish further details. Later, Ext.P17 letter dated 26.4.1984 was issued for return of letter of credit and informed to produce demand draft to STC and requested to avail 15,000 metric tonnes of cement at Mangalore Port. STC returned the letter of credit to A1 who acknowledged the letter on 26.4.1984 itself. PW4 informed A1 about allotment of 9,000 metric tonnes of cement by Ext.P5 (17). Later, it was modified to 15,000 metric tonnes of cement as can be seen from Ext.P5 (18). A further allotment of 10,600 metric tonnes of cement was made as per Ext.P5 (19). A1 rang up A3 and informed that demand draft to be deposited on the same day at Madras office. Then by Ext.P5 (30) an offer was made to purchase the cement which was rejected by A3. Thereafter, A1 again appeared and requested for change of Port to Mangalore and Ext.P9 note was submitted by PW4 to A3 explaining the

necessity to execute a fresh contract with A1 as plans for construction in Malappuram was submitted. PW2 agreed with the suggestion of PW4 as it is borne out from Ext.P9 (4). Ext.P9 (4) was placed before A3. A3 recommended, but, directed to verify the documents produced. By Ext.P5 (10) PW3 recommended to cancel the contract as STC received Ext.P5 (10) complaint forwarded by K.T.Koshalram, M.P. But, A3 commended that the complaint is baseless. Later, A1 deposited the amount and A1 undertook that the cement is for the bona fide purpose of construction of houses for the repatriates from Burma and Vietnam. PW21 rented out first floor of his building to A1. He also affirmed personal visit of PW7 to inquire about A1. It has come out in evidence, especially of PW16, that he purchased a plot in Madhavaram of which A1 was a middleman. A1 sold 13 blocks of land to the staff of Catholic Centre in 1969. PWs 16 to 22 were examined to show that A1 was only a middleman. Evidence of witnesses would show that A1 with the aid of PW1 and A2 were able to cheat the officers of STC including A3 successfully who bona fide believed the plan and submissions. A1, a Catholic priest, submitted all

documents which are duly supported by PW1. As rightly held by the Special Court there is no evidence to show that A3 has accepted any illegal gratification or able to get any pecuniary advantage. There is also no evidence to show that he demanded any pecuniary advantage. In such circumstances, there is no necessity for him to make any such illegal conspiracy.

11. The trial judge mainly relied on Ext.P53 contract and convicted the appellant under section 409. In Ext.P53 not only A3 signed for STC. A3, PWs 2, 3 and another signed on behalf of STC. Merely because a contact on behalf of the establishment is signed is not sufficient to fasten liability on A3 under section 409 IPC. A3 was working at Delhi office and cement was imported from abroad at Tuticorin. A1, A2, A4 and A11 had taken delivery of the cement. Prosecution did not adduce any evidence to prove thatA3 was in any way connected with the delivery of cement or use of cement in violation of contract entered into by the Guild with STC. A3 is only an officer of STC taking part in the day-to-day administration of the establishment. There is no evidence to show that A3 have no special knowledge about

any of the dealings of the other accused or disposal of cement by other accused in South India was not done with the knowledge or approval of A3. A3 was convicted under section 120B IPC solely on the basis of evidence of approver which was not corroborated by any other evidence.

12. As held by the Apex Court in Balwant Kaur v. Union Territory of Chandigarh (AIR 1988 SC 139), approver's evidence in regard to conspiracy needs corroboration on material particulars to connect the accused with the offence. There is no corroborative evidence for convicting the accused under section 120 B IPC. To convict a person for conspiracy, it is to be proved that there were meetings of mind between persons. It was held by a three-member Bench of the Hon'ble Apex Court in P.K.Narayanan v. State of Kerala ((1995) 1 SCC 142) as follows:

> "9. ..... An offence of conspiracy cannot be deemed to have been established on mere suspicion and surmises or inferences which are not supported by cogent evidence.
>
> 10. The ingredients of this offence are that there should be an agreement between the persons who are alleged to conspire and

> the said agreement should be for doing of an illegal act or for doing by illegal means an act which by itself may not be illegal. Therefore the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and it is a mater of common experience that direct evidence to prove conspiracy is rarely available. Therefore the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. But if those circumstances are compatible also with the innocence of the accused persons then it cannot be held that the prosecution has successfully established its case. Even if some acts are proved to have been committed it must be clear that they were so committed in pursuance of an agreement made between the accused who were parties to the alleged conspiracy. l Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation....."

It was further held by the Apex Court in K.R. Purushothaman v. State of Kerala ((2005) 12 SCC 631) that

mere knowledge even discussion of the plan would not per se constitute conspiracy. It is observed as follows:

> "13. To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstance of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing circumstantial evidence viz.,s each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about

> the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement."

13. In this case, the trial court found that the other accused are not guilty of conspiracy. Consequently, the appellant also cannot be convicted under section 120B. The conspiracy as per the allegation in the charge is hatched at Madras. A3 was admittedly in Delhi at that time. He was neither present nor involved in the conspiracy. A3 received application from Guild and forwarded the same to PW3 for scrutiny. The application was then sent to the audit department for scrutiny and was found in order. Being a trading concern, customers are free to present application directly to the STC. However, once the application is

received by any person, it has to undergo the scrutiny at various levels and checks as set up by the STC including in pre-audit by the Finance Department. Cement Division of STC is under the charge of Executive Director. All the superiors of the appellant including the Chairman of STC were aware of the allotment of cement to the Guild. On 3.7.1984 the appellant had sent a message to the Madras office requesting the officials at Madras to verify and satisfy themselves before effecting the sale. Thus, it can be seen that the officials at Madras had acted on their own and the appellant had no role even remotely. Apart from the above, there is also technical objection in accepting the evidence of PW1 approver. Evidence of PW1, the approver, cannot be relied since there is no compliance as envisaged under section 306 (4) of the Code of Criminal Procedure. PW1 was given pardon by the III Metropolitan Magistrate, George Town, Madras. At no point of time, the Metropolitan Magistrate dealt with this case. No offence had taken place within his territorial jurisdiction. But, no further proceedings have taken place as envisaged under section 306 (4) Cr. P.C. Section 306 (4) Cr.P.C. reads as follows:

> "Every person accepting a tender of pardon made under sub section (1) (a) shall be examined as a witness in the Court of Magistrate taking cognizance of offence and in the subsequent trial, if any."

Non-compliance with statutory mandate vitiate the trial. Hence, pardon granted is vitiated. PW1 cannot be treated as an accomplice as contemplated under law and he cannot be treated as a witness as statutory mandate has not been complied with. Hence, conviction under section 120 B cannot stand as against the appellant solely on the evidence of PW1.

14. Even though PW216 was examined, in cross-examination, he stated that he is unable to produce authorisation authorising him to file the complaint. The complaint file produced was only a complaint which was incomplete. Cognizance of offence under section 5 of the Impex Act can only be taken on a complaint by the authorised officer. There is no evidence how cognizance was taken under the Impex Act. Pages 4 to 17 of the complaint are missing. Even the complaint produced would show that it is not signed or it bears no seal of the court where it was filed. In the circumstances of the

case, I am of the view that a case has been made out by the accused as rightly held by the trial court that A1 might have misrepresented A4 to A11 regarding the genuineness of the deeds and he must have misled them and other officers of STC. Even if evidence of accomplice is accepted, according to him, in the conspiracy, there were other conspirators like Sasidharan, Nagarajan and Thomas apart from A1 and A2. They were neither made as accused or named as witnesses. In these circumstance, I am of the view that despite a large volume of documents produced, prosecution was not able to prove a case against the accused. I am also informed that the departmental enquiry conducted against A3 was prosecuted by CBI itself and in the departmental enquiry it was found that A3 is not guilty of any misconduct. Evidence required in criminal case is much more heavy than in the departmental enquiry. I am also told that a criminal case tried before the Special Judge at Delhi for accumulation of wealth by A3 (the allegation was that he got unaccounted wealth through this transaction) and he was acquitted. In any event, even if evidence of PW1 is accepted, what can be assumed is that

A1 with the actual help of PW1 and A2 has duped the STC by producing false documents and it cannot be stated that the charges alleged against other accused were proved. In any event, prosecution was not able to prove the charges levelled against A3 to A8. In the above circumstance, Criminal Appeal No.245 of 1997 is allowed. Conviction and sentence of A3 under section 120B and 409 of the Indian Penal Code and section 5 of the Impex Act are set aside. Crl. Appeal Nos.672 and 673 of 1997 against the acquittal of A3 as well as A4 to A8 are dismissed.

J.B.KOSHY
JUDGE

vaa

J.B. KOSHY, J.

CRL.APPEAL Nos.245,
672 & 673/97

Judgment

Dated:3rd January, 2007